



ITEM NO. 7

## STAFF REPORT

DATE: DECEMBER 20, 2011  
TO: HONORABLE MAYOR AND CITY COUNCIL  
FROM: ROD FOSTER, CITY MANAGER  
PREPARED BY: AMER JAKHER, PUBLIC WORKS/UTILITY SERVICES DIRECTOR  
SUBJECT: COLTON QUIET ZONE PROJECT

### RECOMMENDED ACTION

It is recommended that the City Council: (1) approve the Construction and Maintenance Agreement for the Colton Quiet Zone Project between the City of Colton, San Bernardino Associated Governments, and Burlington Northern Santa Fe Rail Company; (2) authorize the Mayor to execute the agreement with any minor non-substantive changes as recommended by the City Attorney; and (3) direct staff to re-file, within five (5) days, the CEQA Notices of Exemption for the Colton Quiet Zone Project, as discussed in the "Environmental Review" section below.

### GOAL STATEMENT

The proposed action will support the City's goal to improve the traffic circulation and the quality of life for Colton residents and business owners.

### BACKGROUND

The Colton Quiet Zone Project ("Project") is one of the four improvement projects identified in the Funding Agreement Related to the Colton Crossing Railgrade Separation Project ("Funding Agreement"), approved on or about October 5, 2011, between the City of Colton, San Bernardino Associated Government (SANBAG), Burlington Northern Santa Fe Rail Company (BNSF) and Union Pacific Rail Road (UPRR).

The Project includes the closure of existing grade crossings at the BNSF rail line and the installation of cul-de-sacs at E Street and H Street, as well as the installation of quadrant gates and signal system improvements at Valley Boulevard and Olive Street. These improvements also entail the installation of a wrought iron fence, sidewalk and raised median island (Valley Boulevard and Olive Street), as well as pavement striping and markings.

## ISSUES/ANALYSIS

SANBAG is preparing the environmental and engineering documentation (final designs, specifications and estimates) for the Project. The City is the lead agency for California Environmental Quality Act (CEQA) purposes, and will be responsible for project construction (other than all railroad signals and quadrant gate works necessary for these projects, which will be performed by BNSF).

The City Council approved the Construction and Cooperative Agreement for Colton Quiet Zone Project between the City of Colton and SANBAG on December 6, 2011. At the same meeting, the Highway-Railroad Crossing Closure Agreement for E and H Street was also approved. This agreement is between the City, SANBAG and BNSF. As provided for in the Funding Agreement, the Project is required to commence construction within 3 months after the construction of the Colton Crossing Project begins.

SANBAG is contributing 100% of all construction capital and construction support costs for the project. The total construction cost estimate, including construction capital costs (construction cost, contingency, permits, and flagging), and construction support costs (administration and contingency), is estimated to be \$1,019,855. That may change, of course, but SANBAG is responsible for all costs (other than escalation and interest if the project is delayed).

After completion of the Project, the City will be responsible for maintaining all roadway improvements within City right of way, such as asphalt, curb, gutter, sidewalk and steel fencing, while BNSF will maintain all improvements that relate to crossing safety, such as crossing signal and gates.

It is important to note that BNSF is also requiring the City to indemnify them from 3rd party claims that the Project will cause more noise, traffic delays or diminution in property value. Staff understands that this is a standard provision in BNSF's quiet zone agreements, but it does involve some risk for the City that the Council must be willing to accept. Article IV, Section 22(b) provides as follows:

City shall also defend, indemnify and hold harmless BNSF, its affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees and agents from and against any claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments and expenses (including, without limitation, court costs and attorneys' fees) of any nature, kind or description of any person alleging the Quiet Zone causes additional noise from the BNSF gate crossing bells, or that the Quiet Zone causes additional traffic delays or diminution in property value as it relates to BNSF's operation within the Quiet Zone.

## **FISCAL IMPACTS**

The improvements for the Colton Quiet Zone Project are estimated to be \$1,019,855. The City will be the lead agency for construction of this project including submitting payments for all construction and project related costs. All expenses incurred by the City for this project are 100% recoverable by SANBAG on a reimbursement basis. The costs of maintaining the City improvements after construction will be covered under the Public Works Department annual budget for street maintenance.

## **ENVIRONMENTAL REVIEW**

The Colton Quiet Zone Project is an exempt project under CEQA. The Project is Categorically Exempt (State CEQA Guidelines Section 15301(c)) and Statutorily Exempt (State CEQA Guidelines Section 15282(g) and Section 21080.13 of the Public Resource Code), since it involves the elimination of existing at-grade railroad crossings at two locations and the installation of new crossing equipment and roadway work that implicates negligible or no expansion of uses currently existing. Since there is no federal funding involved, the Project does not require compliance under the National Environmental Policy Act (NEPA). The Notice of Exemption for this Project was filed with the San Bernardino County Clerk's office on September 28, 2011; however, pursuant to State CEQA Guidelines Section 15061(d), the Notices of Exemption will be re-filed with the County Clerk should Council take the actions recommended by Staff.

## **ALTERNATIVES**

1. Provide alternative direction to staff.

## **ATTACHMENTS**

Attachment A – Colton Quiet Zone Project – Construction & Maintenance Agreement between the City of Colton, SANBAG, and BNSF

## CONTRACT SUMMARY SHEET

Contract No. C12007

Amendment No. N/A

By and Between

San Bernardino County Transportation Authority and City of Colton and BNSF

Contract Description Colton Quiet Zone Construction and Maintenance Agreement

**Board of Director's Meeting Date:** January 4, 2012

**Overview of BOD Action:** Approve cooperative agreement C12007

Is this Sole-Source procurement? ☐ Yes ☒ No

### CONTRACT OVERVIEW

Original Contract Amount	\$	1,787,889	Original Contingency Amount	\$	0
Revised Contract Amount <i>Inclusive of prior amendments</i>	\$	-	Revised Contingency Amount <i>Inclusive of prior amendments</i>	\$	-
Current Amendment Amount	\$	-	Contingency Amendment	\$	-
TOTAL CONTRACT VALUE	\$	1,787,889	TOTAL CONTINGENCY VALUE	\$	0
TOTAL BUDGET AUTHORITY(contract value + contingency)				\$	1,787,889
Contract Start Date 1/04/12	Current Contract Expiration Date 12/30/13		Revised Contract Expiration Date -		
Has the contract term been amended? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes - please explain.					

### FINANCIAL INFORMATION

☒ Budget authority for this contract currently exists in Task No. 886

☐ A Budget Amendment is required.

How are we funding current FY? **This agreement has no financial impact**

☐ Federal Funds ☐ State Funds ☐ Local Funds ☐ TDA Funds ☒ Measure I Funds

Provide Brief Overview of the **Overall** Funding for the duration of the Contract: To be paid 100% MSI Valley-Freeway

☒ Payable ☐ Receivable

### CONTRACT MANAGEMENT INFORMATION

**Check all applicable boxes:**

☐ Retention? If yes, indicate \_\_\_\_\_ %

☐ Disadvantaged Business Enterprise (DBE) Goal \_\_\_\_\_ % ☐ Underutilized DBE (UDBE) Goal \_\_\_\_\_ %

Task Manager Signature

Date

Project Manager Signature

Date

Chief Financial Officer Signature

Date

Contracts Manager Signature

Date

**AGREEMENT FOR CONSTRUCTION AND MAINTENANCE OF  
SAFETY IMPROVEMENTS RELATED TO QUIET ZONE**

**BNSF Contract No: \_\_\_\_\_  
Colton Quiet Zone Project**

THIS AGREEMENT made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2011, by and between the CITY OF COLTON, hereinafter referred to as "City", the SAN BERNARDINO COUNTY TRANSPORTATION AUTHORITY, hereinafter referred to as "Authority", and the BNSF RAILWAY COMPANY, a Delaware corporation, hereinafter referred to as "BNSF". City, Authority, and BNSF are collectively referred to as "Parties".

**RECITALS**

WHEREAS, the intersection of the Union Pacific Railroad (UPRR) rail line and the Burlington Northern Santa Fe (BNSF) rail line immediately south of Interstate 10, east of South Rancho Avenue and west of South La Cadena Drive in the City of Colton, is generally referred to as the Colton Crossing (the "Colton Crossing"). The Parties have designed a project to grade-separate the Colton Crossing to improve freight and passenger rail mobility and efficiency by eliminating conflicting train movements (the "Colton Crossing Project").

WHEREAS, residents adjacent and near the rail lines in the general vicinity of the Colton Crossing, specifically those adjacent to the BNSF rail line north of I-10, are seeking relief from railroad train horn noise; and

WHEREAS, the local traffic circulation for the City is affected by the numerous trains passing through at-grade crossings within the City's limits; and

WHEREAS, in relation to but separate from the Colton Crossing Project, UPRR, the Authority, BNSF, and the City agreed in a Funding Agreement Related to the Colton Crossing Railgrade Separation Project ("Funding Agreement"), approved on or about October 5, 2011, to implement a series of projects that the City believes are needed to address the noise and circulation issues described above; and

WHEREAS, one of the projects identified in the above paragraph would establish a quiet zone by eliminating two existing grade crossings at H Street and E Street respectively and improving rail crossing signals at two existing grade crossing gates at Valley Boulevard and Olive Street to meet the California Public Utilities Commission (CPUC) and the Federal Railroad Administration (FRA) quiet zone crossing standards; and

WHEREAS, Authority is the agency responsible for the preparation of the final project plans and specifications; and

WHEREAS, the project consists of two components; the first is the removal and installation of rail crossing signals ("Railroad Work") and second is construction of roadway improvements ("Roadway Work"); and

WHEREAS, the Railroad Work and Roadway Work shall be collectively referred to as the "Safety Improvements" in this Agreement; and

WHEREAS, Authority and City agreed to enter into this separate construction and maintenance agreement with BNSF for the removal and installation of the Safety Improvements; and

WHEREAS, BNSF owns a railroad line in and through the City which crosses at least five (5) City streets at-grade (the "Crossings") and over which trains are operated at all times of the day and night with safety features for motorists and pedestrians, including a system of warning signals and gates at crossings and the use of warning horns on trains; and

WHEREAS, the City and Authority are currently seeking authorization and approval from the CPUC to construct certain safety improvements at the Crossings, as shown in Exhibit "A" attached hereto and incorporated herein by this reference (the "Project"); and

WHEREAS, the City is desirous of creating a quiet zone as provided by the FRA and 49 CFR Parts 222 and 229 of the Federal Register; and

WHEREAS, the establishment of the quiet zone is subject to the approval by the FRA pursuant to 49 CFR Parts 222 and 229; and

WHEREAS, the Parties agree to cooperate in the construction of the safety improvements; and

WHEREAS, the safety improvements are intended to be permanent improvements at the Crossings unless the Crossings are grade separated or closed to vehicular traffic; and

WHEREAS, City and AUTHORITY have entered into a separate Construction Cooperative Agreement, dated December 7, 2011 (SANBAG agreement C12006), where it has been agreed that the CITY will be responsible for the construction of the Roadway Work at Authority's sole cost and expense as identified in Exhibit A ("Roadway Construction Agreement"); and

WHEREAS, BNSF will be responsible for the Railroad Work as identified in Exhibit A at the Authority's cost; and

NOW, THEREFORE, in consideration of the mutual covenants and conditions hereinafter set forth, and subject to the approval of the Project by the CPUC, the Parties agree as follows:

## **AGREEMENT**

### **ARTICLE I**

1. BNSF, at Authority's sole cost and expense, shall furnish all labor, materials, tools, and equipment and perform the railroad work required for construction of the safety improvements, such work and the estimated cost thereof being shown in Exhibit "B" attached hereto. The principal elements of the railroad work to be performed by BNSF in the construction of the safety improvements shall include the following:

- a. Removal of existing signals and lights as shown on Exhibit "A";
- b. Construction and installation of the railroad signal active warning devices as shown on Exhibit "A";
- c. Installation of the vehicle detection system;
- d. Furnishing watchmen and flagmen as may be necessary for the safety of BNSF's property and the operation of its trains during the construction of the safety improvements.

2. BNSF agrees to perform all work provided in Article I, Section 1, with its own employees, working under Railroad Labor Agreements or by contractor(s), if necessary, within 18 months from receiving "Notice to Proceed" to be given in accordance with Article II, Section 10. BNSF shall determine the construction schedule of Railroad Work required for the Safety Improvements and has the right at any time to revise or change the construction schedule, due to train operations or service obligations. BNSF will not be responsible for any additional costs and expenses resulting from a change in the construction schedule. BNSF will not be responsible for any additional costs and expenses resulting from a change in the construction schedule caused or required by a City contractor. Such additional costs and expenses shall be accounted for in Authority's expenses for the Project.

3. BNSF is hereby authorized to include any extraordinary charge to cover the cost of BNSF's self-insurance expense covering Employer's Liability, including liability under the Federal Employer's Liability Act, for protection of its employees in connection with the construction of the Project. Such charge will be included in Exhibit "B" and may not exceed the amount allowed by the Federal Highway Administration at the time of billing and shall be considered a portion of the actual cost of the Project regardless of the nature or amount of ultimate liability for injury, loss or death to BNSF's employees, if any.

4. Subject to numbered paragraph 6, below, in the event the estimates for the railroad work required for the construction of the safety improvements are increased due to the passage of time or a change in the scope of the Project, Authority shall immediately provide BNSF with a credit enhancement sufficient to cover said increased estimates in the form of;

- a. Irrevocable Bank Letter of Credit drawn upon a bank satisfactory to BNSF;
- b. Surety Bond underwritten by an insurance company listed in the Department of Treasury Federal Register with terms acceptable to BNSF, in BNSF's sole discretion; or
- c. A cash deposit posted via wire transfer to a BNSF deposit account.

Any irrevocable letter of credit or surety bond provided to BNSF pursuant to this provision shall have a minimum term of eighteen (18) months. The bank issuing the letter of credit and the insurance company issuing the surety bond shall notify BNSF thirty (30) days prior to the expiration date of the letter of credit or the surety bond. Upon expiration of any surety bond or letter of credit, Authority must provide BNSF with a substitute letter of credit, surety bond or cash deposit as set forth above until Authority's financial obligations to BNSF are fully and finally satisfied.

Any cash deposit provided under this provision will be held in a separate interest bearing account in the name of BNSF, with all interest accruing to Authority's benefit for use on the Project. If Authority's financial obligations at the end of the Project are less than the amount of the cash deposit, BNSF shall refund any remaining sum to Authority.

When posting a cash deposit pursuant to this provision, Authority shall contact Jamie Stamper to obtain the BNSF account information, at: Jamie Stamper, Manager Contract Compliance, BNSF, 2400 Western Center Boulevard, Fort Worth, Texas 76131 (phone: 817-352-3485). BNSF shall release any credit enhancement provided hereunder within thirty (30) days after payment of all funds due under Section 6 of this Article.

5. LOCAL FUNDING: Authority shall pay BNSF for all actual labor costs, material costs, equipment costs, and other costs and expenses incurred by BNSF in performing the railroad work required for construction of the Project in a total amount not to exceed \$1,787,889. This amount consists of the estimated construction cost of \$887,504 as set forth in Exhibit "B", \$0 for flagging, and a construction contingency fund of \$160,926. The construction contingency fund shall be used to reimburse BNSF if its actual construction costs exceed the estimated construction costs. If during the course of construction BNSF anticipates that its actual construction costs will exceed the estimated construction cost, BNSF shall promptly notify Authority so additional funds can be appropriated to complete construction of the railroad work required for the Project. BNSF may discontinue construction activities until such time as Authority notifies BNSF that sufficient additional funds have been appropriated. If Authority fails to appropriate sufficient additional funds, BNSF may terminate this Agreement pursuant to Article III, section 3.

- a. Material Ordering. Concurrently with the giving of the Notice To Proceed (NTP) in accordance with Article II, Section 10 of this Agreement, Authority will issue a check to BNSF for the cost of all material. Upon



receipt of the check and the NTP from the Authority, BNSF will order material and schedule the Project.

- b. Labor. BNSF will invoice Authority for the labor portion of the Project sixty (60) days prior to start of construction. No construction will begin until payment is received by BNSF.
- c. Reconciliation. If BNSF's actual construction costs are less than the total estimated amount set forth in Exhibit B and advanced by Authority in accordance with this section, BNSF will refund the difference to Authority within 180 days after completion of the Project.

## **ARTICLE II**

1. At Authority's sole cost and expense, City shall furnish all labor, materials, tools, and equipment and construct all Roadway Work required for construction of the Safety Improvements as shown in Exhibit "A", except for the railroad work to be performed by BNSF identified herein. The principal elements of the work to be paid for by Authority and performed by City in the construction of the safety improvements shall include the following:

- a. Obtaining from the CPUC an order authorizing and approving the construction of the Safety Improvements;
- b. Providing engineering, supervision, labor, material, supplies, and equipment necessary for construction of the Safety Improvements to be located outside of BNSF's right-of-way;
- c. Installation of the roadway center medians;
- d. Construction of the roadway surface, including without limitation, curbs, gutters and fencing as shown on Exhibit "A".
- e. Secure the location or relocation of wire lines, pipe lines and other facilities owned by private persons, companies, corporations, political subdivisions or public utilities, other than BNSF, which may be found necessary to locate or relocate in any manner whatsoever due to the construction of the Project.

2. Authority shall reimburse BNSF for the actual costs incurred by BNSF in constructing the safety improvements, as set forth in Article I, section 6.

3. Authority agrees to reimburse BNSF for work of an emergency nature caused by City or City's contractor, in connection with construction of the Safety Improvements, which BNSF deems reasonably necessary for the immediate restoration

of railroad operations or for the protection of persons or BNSF property. Such work may be performed by BNSF without prior approval of Authority and Authority agrees to fully reimburse BNSF for all reasonable costs of such emergency work. If Authority fails to reimburse BNSF, BNSF may terminate this Agreement pursuant to Article III, section 3.

4. Except as expressly set forth in this Agreement, BNSF shall be responsible for all construction, reconstruction, operation, maintenance and repair costs related to its business activities.

5. City agrees to acquire all right-of-way and permits necessary for the construction of the Safety Improvements.

6. City agrees at Authority's expense to make any and all arrangements to secure the location or relocation of wire lines, pipe lines and other facilities owned by private persons, companies, corporations, political subdivisions or public utilities other than BNSF which may be found necessary to locate or relocate in any manner whatsoever due to the construction of the Project. Nothing in this Agreement shall be construed to modify the obligations, if any, of the Parties and/or their respective contractors with regard to compliance with the requirements of California Government Code section 4216 et seq. for Project work, which they perform.

7. The City, its contractor(s) and subcontractor(s), shall not begin Project work until City shall have given not less than thirty (30) days prior written notice to BNSF's Manager of Public Projects, making reference to BNSF's "Colton Quiet Zone Project", which notice shall state the time that onsite Project work shall commence.

8. Authority must give BNSF's Manager of Public Projects written NTP with the Railroad Work after receipt of necessary funds for the Project. BNSF will not begin the Railroad Work (including, without limitation, procurement of supplies, equipment or materials) until written notice to proceed is received from Authority. The NTP must reference BNSF's file number: "Colton Quiet Zone".

9. The Authority shall reimburse City in accordance with the provisions of the Roadway Construction Agreement. Notwithstanding anything to the contrary in the Roadway Construction Agreement, all reimbursable Project costs shall include the defined "Total Project Costs" in Section 4 of the Funding Agreement."

### **ARTICLE III**

1. This Agreement shall become effective on the date it is fully executed by all Parties to this Agreement, and shall remain in effect until terminated pursuant to this Article.

2. All reimbursable Project costs shall include the defined "Total Project Costs" in Section 4 of the Funding Agreement.

3. The City may, in its sole discretion, terminate this Agreement for its convenience at any time for any reason. The City shall pay all amounts due BNSF under Articles I, Section (3) and Article II, Sections (3) and (4), of this Agreement up to the effective date of termination, and all reasonable costs incurred by BNSF in removing or mothballing equipment installed under this Agreement to implement the Quiet Zone. After the effective date of termination of the Quiet Zone, BNSF shall have no obligation to treat the Crossings as a Quiet Zone. A termination of this Agreement by City pursuant to this Article III, Paragraph 3, shall release the Authority and BNSF from any and all obligations under the Funding Agreement with respect to the Colton Quiet Zone Improvement Project as defined in the Funding Agreement, including without limitation, any further funding obligations. In the event of a termination of this Agreement by City, the Colton Quiet Zone Improvement Project shall be deemed to be completed for purposes of Section 11, subparagraph a.2. of the Funding Agreement.

4. The Authority may, in its sole discretion, terminate this Agreement if the City materially breaches this Agreement. The Authority shall pay all amounts due BNSF and/or City under Article I and II of this Agreement, up to the effective date of termination, and all reasonable costs incurred by BNSF and/or City in removing or mothballing equipment installed under this Agreement to implement the Quiet Zone. After the effective date of termination of the Quiet Zone, BNSF shall have no obligation to treat the Crossings as a Quiet Zone.

5. BNSF may terminate this Agreement, in its sole discretion, if the AUTHORITY fails to pay the amounts due BNSF under Article I, Section (3) or Article II, Sections (3) and (4) of this Agreement. Prior to termination, BNSF shall send the AUTHORITY and CITY written notice of default and intent to terminate this Agreement, and provide the AUTHORITY with at least thirty (30) days to cure the default. If the AUTHORITY fails to cure the default within the time specified, BNSF may terminate this Agreement by sending the City and Authority written notice thereof. After the effective date of termination of the Quiet Zone, BNSF shall have no obligation to treat the Crossings as a Quiet Zone. The right to terminate this Agreement is in addition to any other remedies BNSF may have for the Authority's failure to pay amounts due under Articles I and II.

6. Upon the termination of this Agreement by any of the Parties, City shall, within fifteen (15) days, file a notice with the FRA pursuant to 49 CFR § 222.51(d) voluntarily terminating the Quiet Zone effective thirty (30) days from the effective date of such notice.

## ARTICLE IV

1. The City agrees to include the following provisions in its contract with any contractor performing construction and maintenance work on the Project in the BNSF right-of-way:

- a. Fiber optic cable systems owned by various telecommunications companies may cross or run parallel in the railroad operating right-of-way. The locations of these lines have been included on the plans based on information from the telecommunications companies. The contractor shall be responsible to contact BNSF and/or the telecommunications companies regarding any work that may damage these facilities or interfere with their service. The contractor shall also pothole all lines either shown on the plans or marked in the field in order to verify their locations. The contractor shall also use all reasonable methods when working within the BNSF right-of-way to determine if any other fiber optic lines may exist;
- b. Failure to notify, pothole or identify these lines shall be sufficient cause for the City Engineer to stop construction at no cost to the City or BNSF until these items are completed. Costs for repairs and loss of revenues and profits due to damage to these facilities through negligent acts of the contractor shall be the sole responsibility of the contractor. The contractor shall indemnify and hold the Authority and BNSF harmless against and from all cost, liability and expense arising out of or in any way connected to the negligent acts of the contractor;
- c. The telecommunications companies shall be responsible for the rearrangement of any facilities determined to interfere with the construction. The contractor shall cooperate fully with any company performing these rearrangements.

2. The City shall incorporate in each prime contract for construction of the Project in, over or under the BNSF right-of-way, or the specifications therefor, the provisions set forth in Exhibits "C" and "C-I", attached hereto and by this reference made a part hereof.

3. Except as hereinafter otherwise provided, all work to be performed hereunder by City in the construction of the Project will be performed pursuant to a contract or contracts to be let by City or performed by the City with its own forces. For work performed by contract, all such contracts shall provide:

- a. That all work performed thereunder shall be performed in a good and workmanlike manner, and in accordance with plans and specifications approved by BNSF. Those changes or modifications during construction that affect safety or BNSF's operations shall also be subject to BNSF's approval;

- b. That no work shall be commenced within BNSF's right-of-way until each of the prime contractors employed in connection with said work shall have (i) executed and delivered to BNSF a letter agreement in the form of Exhibit "C-1", and (ii) delivered to BNSF, and secured its approval of, the required insurance;
- c. That if the contractor has failed to prosecute with diligence the work specified in and by the terms of said contract, City may, in the manner provided by law, terminate the contractor's control over said work and take possession of all or any part thereof and proceed to complete the same by day labor or by employing another contractor(s), provided that all such contractor(s) shall be required to comply with the obligations in favor of BNSF hereinabove set forth and, provided further, that if such construction is performed by day labor, City will, at its expense, procure and maintain on behalf of BNSF the insurance required as identified in Exhibit "C-1".

4. If any City Contractor performs construction work within the BNSF right-of-way contrary to the Plans and Specifications or if any City contractor performs construction work within the BNSF right-of-way in a manner BNSF deems to be hazardous to its property, facilities or the safe and expeditious movement of its traffic, or if the insurance described in said Exhibit "C-1" hereof shall be canceled during the course of the Project, BNSF shall have the right to stop the work within the BNSF right-of-way until the acts or omissions of such City contractor have been fully rectified to the satisfaction of the BNSF's Division Engineer, or additional insurance has been delivered to and accepted by BNSF. Such work stoppage shall not give rise to or impose upon BNSF any liability to City, or to any City contractor. The right of BNSF to stop the work is in addition to any other rights BNSF may have. In the event that BNSF shall desire to stop work, BNSF agrees to give immediate notice thereof in writing to the City and Authority representatives identified in Article IV, Section 13 of this Agreement, describing the reason(s) for the work stoppage.

5. The City shall supervise and inspect the operations of all City contractors working within BNSF's right-of-way to assure compliance with the Project plans and specifications, the terms of this Agreement and all safety requirements of BNSF. If at any time during construction within BNSF's right-of-way BNSF determines that the proper supervision and inspection is not being performed by the City, BNSF shall have the right to stop construction (within or immediately adjacent to its right-of-way) and to request that the City correct the situation before construction is allowed to proceed. If BNSF feels the situation is not being corrected in an expeditious manner, BNSF shall immediately notify the City's Director of Public Works and Authority's Director of Project Delivery for appropriate corrective action.

6. City's contractor(s) and subcontractor(s) shall perform and complete work in a manner that does not interfere with the normal movement of trains and according to contractor's own manner and methods and with and by contractor(s)' and

subcontractor(s)' own means and employees, free from any supervision, inspection, or control whatsoever by BNSF, except that BNSF shall have the right to inspect City's contractor(s)' or subcontractor(s)' work to determine whether the work performed complies with the requirements of this Agreement, it being the intention of the Parties that the contractor(s) and subcontractor(s) shall be and remain independent contractor(s) and subcontractor(s) and that nothing contained in this Agreement shall be construed as inconsistent with that status. City shall require its contractors and their subcontractors constructing any of the Safety Improvements within BNSF's right-of-way to execute and comply with all Contractor Requirements, as set forth in Exhibit "C" hereto.

7. City shall require its contractor(s) and subcontractor(s) to comply with all applicable federal, state and local requirements and regulations with respect to the performance of Project work. To the extent that any City contractor or subcontractor performs work in BNSF's right-of-way, BNSF may advise such contractor or subcontractor, or contractor's or subcontractor's work site supervisor, that an agent or employee of the contractor or subcontractor is working in an unsafe manner or may potentially work in an unsafe manner, in which event such contractor's or subcontractors' work site supervisor shall cause the agent or employee to immediately correct the problem or leave the work site and BNSF's property.

8. The Parties agree that after completion of the safety improvements, BNSF shall maintain and operate all crossing gates and signals.

9. The Parties agree that if BNSF deems it necessary or desirable in the performance of its duty as a common carrier, to raise or lower the grade or change the alignment of its tracks or to lay additional track or tracks or to build other facilities in connection with the operation of its railroad, BNSF shall, at its own expense, have full right to make such changes or additions within its right of way, provided such changes or additions do not change or alter the Safety Improvements and provided further, however, that should it become necessary or desirable in the future to change, alter, widen, or reconstruct the Safety Improvements to accommodate BNSF railroad projects, the costs of such work, including any cost incidental to alteration of railroad or highway facilities made necessary by the alteration of the Safety Improvements, shall be paid by BNSF. Should such improvements affect the crossings' Quiet Zone Status, BNSF at its own cost shall immediately modify the proposed improvements to adhere to Quiet Zone status requirements.

- a. Notwithstanding the foregoing, nothing in this Agreement shall be construed as waiving or conditioning the right of the City to object to any effort by BNSF to change the grade or track alignment in any way that would impact (a) the City's interests in or use of adjacent right-of-way or
- b. The use of the at-grade crossings that are the subject of this Agreement.

10. The Parties agree that if City shall deem it necessary or desirable in the future, due to traffic or other conditions, to alter or reconstruct the Safety Improvements, it shall have full right to do so, at City's own expense and subject to CPUC approval, provided, however, that such alteration or reconstruction shall not encroach further upon or occupy the surface of BNSF's right-of-way to a greater extent than is contemplated by this Agreement without the prior CPUC approval and written consent of BNSF and the execution of an amendment to this Agreement or the completion of a separate written agreement.

11. The books, papers, records and accounts of the Parties hereto, insofar as they relate to the items of expense for labor and materials or are in any way connected with the work herein contemplated, shall be retained and at all reasonable times be open to inspection and audit by the agents and authorized representatives of the other Party hereto, and representatives of governmental agencies as required by law, for a period of four (4) years from the date of final payment. Upon completion of the Project, City, Authority, and/or representatives of governmental agencies as required by law, may assign an auditor to review and report on BNSF, City's, and Authority's time sheets and financial records related to this Project. The Parties shall work with such auditors to reconcile excepted costs that may arise from any audit. All books, records and accounts relating to the maintenance and repair costs which are the subject of an invoice pursuant to Article II shall be retained and open to inspection and audit by agents and authorized representatives of the City or Authority for a period of four (4) years from the date that BNSF provides such invoice to the City or Authority.

12. All notices shall be in writing and shall be considered given either: (i) when delivered in person to the recipient named below; or (ii) on the date of delivery or refusal shown on the return receipt, after deposit in the United States mail in a sealed envelope as either registered or certified mail with return receipt requested, and postage and postal charges prepaid; (iii) on the date of delivery or refusal, when delivered by Federal Express or other commercial express delivery service providing acknowledgements of receipt; or (iv) on the date of delivery when delivered by facsimile or other electronic transmission providing verification of delivery and receipt. Such notices or communications shall be given to the Parties at their addresses set forth below:

To BNSF:                      BNSF Railway Company  
Vice-President and Chief Engineer  
2600 Lou Menk Drive  
Fort Worth, TX 76131

With Copy To:              BNSF Railway Company  
Manager of Public Projects  
740 East Carnegie Drive  
San Bernardino, CA 92408-3571

To City: City of Colton  
Public Works Director  
160 South 10th Street  
Colton, CA 92324

To Authority: San Bernardino Associated Governments  
Director of Project Delivery  
1170 W. 3rd Street, 2nd Floor  
San Bernardino, CA 92410

Either Party may change its address for notices by written notice to the other Party given in the manner provided in this section.

13. Exhibits "A", "B", "C" and "C-1" attached hereto, are an integral part of this Agreement and shall be construed for all purposes as a part of this Agreement.

14. The venue for any action to enforce or interpret this Agreement shall lie in the Superior Court for the County of San Bernardino or the District Court for the Southern District of California, as appropriate.

15. Any waiver by the Parties of any default or breach of any covenant, condition, or term contained in this Agreement shall not be construed to be a waiver of any subsequent or other default or breach, nor shall the failure to require exact, full, and complete compliance with any of the covenants, conditions, or terms contained in this Agreement be construed as changing the terms of this Agreement in any manner or preventing the enforcement of the full provisions hereof.

16. If any action at law or in equity is necessary to enforce or interpret the terms of this Agreement, the prevailing Party shall be entitled to reasonable attorney's fees and costs.

17. This Agreement constitutes the entire understanding and agreement of the Parties hereto and supersedes all previous negotiations, discussions, and agreements between the Parties with respect to the subject matter hereof. No parol evidence shall be permitted to contradict or vary the terms of this Agreement.

18. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be invalid under the applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of that provision, or the remaining provisions of this Agreement.

19. The Parties agree that all of the covenants and provisions of this Agreement shall be binding upon and inure to the benefit of the Parties' successors and assigns, except that neither City, Authority, nor BNSF may assign any of its rights or



obligations hereunder without the prior written consent of the other party, which consent shall not be unreasonably withheld.

20. The Recitals above are hereby incorporated into this section as though fully set forth herein and each party acknowledges and agrees that such Party is bound, for purposes of this Agreement, by the same.

21. Each of the undersigned represents and warrants that he or she is duly authorized to execute and deliver this Agreement and that such execution is binding upon the entity for which he or she is executing this document.

22.

- a. To the fullest extent permitted by law, the City and BNSF agree to save, indemnify, defend and hold harmless each other and their affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees and agents for, from and against any and all claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments and expenses (including, without limitation, court costs and attorneys' fees) of any nature, kind or description, of any person (including, without limitation, the employees of the parties hereto) or entity whether actual, alleged or threatened, incurred in relation to, as a consequence of, or arising out of, the performance of this Agreement and attributable to the fault of the indemnifying party or its affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees, agents, invitees, contractors, or anyone directly or indirectly employed by any of them, or others performing services in furtherance of this Agreement on their behalf. Following a determination of the percentage of fault and or liability by agreement between the City and BNSF or a court of competent jurisdiction, the Party responsible for liability to the other will indemnify the other Party for the percentage of liability determined. The indemnification obligation of the Parties hereunder does not apply to claims, actions, losses, damages, and/or liability arising out of a Party's "willful misconduct" within the meaning of Civil Code Section 2782.
- b. City shall also defend, indemnify and hold harmless BNSF, its affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees and agents from and against any claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments and expenses (including, without limitation, court costs and attorneys' fees) of any nature, kind or description of any person alleging the Quiet Zone causes additional noise from the BNSF gate crossing bells, or that the Quiet Zone causes additional traffic delays or diminution in property value as it relates to BNSF's operation within the Quiet Zone.

- c. To the fullest extent permitted by law, City and BNSF each agree to save, indemnify, defend and hold harmless the Authority and its affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees and agents for, from and against any and all claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments and expenses (including, without limitation, court costs and attorneys' fees) of any nature, kind or description, of any person (including, without limitation, the employees of the parties hereto) or entity, whether actual, alleged or threatened, incurred in relation to, as a consequence of, or arising out of, the performance of this Agreement and attributable to the fault of the indemnifying party or its affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees, agents, invitees, contractors, or anyone directly or indirectly employed by any of them, or others performing services in furtherance of this Agreement on their behalf. Authority and the City shall indemnify each other pursuant to the provisions of the Roadway Construction Agreement.

24. During construction of the Safety Improvements, the City shall ensure the contractor maintains all the insurance required by section 3 of Exhibit C-1. The City shall be insured for its general liability coverage up to \$4 million. The City shall participate in large risk pool CSAC-EIA/CPEIA coverage which provides excess coverage from \$4 million to \$15 million, or in a similar program of insurance providing these limits and scope of coverage. The City will maintain excess coverage beyond the limits of the pool coverage with total limits of \$50 million. The City may determine from time to time to increase the amount of self-insurance coverage. If the City makes a determination to increase the self-insurance amount, the large risk pool coverage will apply over the self-insurance amount. The City shall remove any exclusions relating to performance of operations within the vicinity of any railroad, bridge, trestle, track, roadbed, tunnel, underpass, or crossing from its general liability coverage for both the self-insured and excess policies, or purchase a separate railroad protective liability policy. If a separate railroad protective liability policy is purchased it shall be in an amount of at least \$2,000,000 per occurrence and \$6,000,000 aggregate. The insurance policies shall name BNSF, its directors, officers, agents and employees as additional insureds (or a named insured in the case of a separate railroad protective liability policy), and be primary to any insurance carried by BNSF.

IN WITNESS WHEREOF, this Agreement is executed by the San Bernardino County Transportation Authority, City of Colton, acting by and through its Mayor or his designee and by BNSF attested by its duly qualified and authorized officials as of the date first hereinabove written.

**BNSF RAILWAY COMPANY**  
A Delaware corporation

**CITY OF COLTON**  
A public body

\_\_\_\_\_  
Sanford C Sexhus  
Vice President of Engineering

\_\_\_\_\_  
Sarah S. Zamora  
Mayor

*Approved as to Legal Form*

\_\_\_\_\_  
Dean Derleth  
City Attorney

**SAN BERNARDINO COUNTY  
TRANSPORTATION AUTHORITY,**  
A joint powers authority

\_\_\_\_\_  
Larry McCallon  
President, Board of Directors

*Approved as to Legal Form*

\_\_\_\_\_  
Penny Alexander-Kelley  
General Counsel

*Concurrence*

\_\_\_\_\_  
Kathleen Murphy-Perez  
Contracts Manager

**Exhibit A (1 of 2)**

**Olive Street – 026450W DOT  
MP 2.40 - San Bernardino Sub**

**Exhibit A (2 of 2)**

**Valley Boulevard – 026456M DOT  
MP 3.10 - San Bernardino Sub**

**Exhibit B**

**Please see attachment - BNSF Signal Estimates**

## **EXHIBIT "C"**

### **CONTRACTOR REQUIREMENTS**

#### **1.01 General**

- **1.01.01** The Contractor must cooperate with **BNSF RAILWAY COMPANY**, hereinafter referred to as "Railway" where work is over or under on or adjacent to Railway property and/or right-of-way, hereafter referred to as "Railway Property", during the construction of **Colton Quiet Zone Project**.
- **1.01.02** The Contractor must execute and deliver to the Railway duplicate copies of the Exhibit "C-1" Agreement, in the form attached hereto, obligating the Contractor to provide and maintain in full force and effect the insurance called for under Section 3 of said Exhibit "C-1". Questions regarding procurement of the Railroad Protective Liability Insurance should be directed to Rosa Martinez at Marsh, USA, 214-303-8519.
- **1.01.03** The Contractor must plan, schedule and conduct all work activities so as not to interfere with the movement of any trains on Railway Property.
- **1.01.04** The Contractor's right to enter Railway's Property is subject to the absolute right of Railway to cause the Contractor's work on Railway's Property to cease if, in the opinion of Railway, Contractor's activities create a hazard to Railway's Property, employees, and/or operations. Railway will have the right to stop construction work on the Project if any of the following events take place: (i) Contractor (or any of its subcontractors) performs the Project work in a manner contrary to the plans and specifications approved by Railway; (ii) Contractor (or any of its subcontractors), in Railway's opinion, prosecutes the Project work in a manner which is hazardous to Railway property, facilities or the safe and expeditious movement of railroad traffic; or (iii) the insurance described in the attached Exhibit C-1 is canceled during the course of the Project. The work stoppage will continue until all necessary actions are taken by Contractor or its subcontractor to rectify the situation to the satisfaction of Railway's Division Engineer or until additional insurance has been delivered to and accepted by Railway. Any such work stoppage under this provision will not give rise to any liability on the part of Railway. Railway's right to stop the work is in addition to any other rights Railway may have including, but not limited to, actions or suits for damages or lost profits. In the event that Railway desires to stop construction work on the Project, Railway agrees to immediately notify the following individual in writing:

City of Colton

- **1.01.05** The Contractor is responsible for determining and complying with all Federal, State and Local Governmental laws and regulations, including, but not limited to environmental laws and regulations (including but not limited to the Resource Conservation and Recovery Act, as amended; the Clean Water Act, the Oil Pollution Act, the Hazardous Materials Transportation Act, CERCLA), and health and safety laws and regulations. The Contractor hereby indemnifies, defends and holds harmless Railway for, from and against all fines or penalties imposed or assessed by Federal, State and Local Governmental Agencies against the Railway which arise out of Contractor's work under this Agreement.
- **1.01.06** The Contractor must notify the (City of Colton) at (909) 370-5065 and Railway's Manager Public Projects, telephone number (909)386-4472 at least thirty (30) calendar days before commencing any work on Railway Property. Contractor's notification to Railway, must refer to Railroad's file "Colton Quiet Zone."
- **1.01.07** For any bridge demolition and/or falsework above any tracks or any excavations located with any part of the excavations located within, whichever is greater, twenty-five (25) feet of the nearest track or intersecting a slope from the plane of the top of rail on a 2 horizontal to 1 vertical slope beginning at eleven (11) feet from centerline of the nearest track, both measured perpendicular to center line of track, the Contractor must furnish the Railway five sets of working drawings showing details of construction affecting Railway Property and

tracks. The working drawing must include the proposed method of installation and removal of falsework, shoring or cribbing, not included in the contract plans and two sets of structural calculations of any falsework, shoring or cribbing. For all excavation and shoring submittal plans, the current "BNSF-UPRR Guidelines for Temporary Shoring" must be used for determining the design loading conditions to be used in shoring design, and all calculations and submittals must be in accordance with the current "BNSF-UPRR Guidelines for Temporary Shoring". All submittal drawings and calculations must be stamped by a registered professional engineer licensed to practice in the state the project is located. All calculations must take into consideration railway surcharge loading and must be designed to meet American Railway Engineering and Maintenance-of-Way Association (previously known as American Railway Engineering Association) Coopers E-80 live loading standard. All drawings and calculations must be stamped by a registered professional engineer licensed to practice in the state the project is located. The Contractor must not begin work until notified by the Railway that plans have been approved. The Contractor will be required to use lifting devices such as, cranes and/or winches to place or to remove any falsework over Railway's tracks. In no case will the Contractor be relieved of responsibility for results obtained by the implementation of said approved plans.

- **1.01.08** Subject to the movement of Railway's trains, Railway will cooperate with the Contractor such that the work may be handled and performed in an efficient manner. The Contractor will have no claim whatsoever for any type of damages or for extra or additional compensation in the event his work is delayed by the Railway.

## **1.02 Contractor Safety Orientation**

- **1.02.01** No employee of the Contractor, its subcontractors, agents or invitees may enter Railway Property without first having completed Railway's Engineering Contractor Safety Orientation, found on the web site [www.contractororientation.com](http://www.contractororientation.com). The Contractor must ensure that each of its employees, subcontractors, agents or invitees completes Railway's Engineering Contractor Safety Orientation through internet sessions before any work is performed on the Project. Additionally, the Contractor must ensure that each and every one of its employees, subcontractors, agents or invitees possesses a card certifying completion of the Railway Contractor Safety Orientation before entering Railway Property. The Contractor is responsible for the cost of the Railway Contractor Safety Orientation. The Contractor must renew the Railway Contractor Safety Orientation annually. Further clarification can be found on the web site or from the Railway's Representative.

## **1.03 Railway Requirements**

- **1.03.01** The Contractor must take protective measures as are necessary to keep railway facilities, including track ballast, free of sand, debris, and other foreign objects and materials resulting from his operations. Any damage to railway facilities resulting from Contractor's operations will be repaired or replaced by Railway and the cost of such repairs or replacement must be paid for by the Agency.
- **1.03.02** The Contractor must notify the Railway's General Manager Mark Kirschinger at (909) 386-4150 and provide blasting plans to the Railway for review seven (7) calendar days prior to conducting any blasting operations adjacent to or on Railway's Property.
- **1.03.03** The Contractor must abide by the following temporary clearances during construction:
  - 15'                      Horizontally from centerline of nearest track
  - 21'-6"                  Vertically above top of rail
  - 27'-0"                  Vertically above top of rail for electric wires carrying less than 750 volts
  - 28'-0"                  Vertically above top of rail for electric wires carrying 750 volts to 15,000 volts
  - 30'-0"                  Vertically above top of rail for electric wires carrying 15,000 volts to 20,000 volts
  - 34'-0"                  Vertically above top of rail for electric wires carrying more than 20,000 volts
- **1.03.04** Upon completion of construction, the following clearances shall be maintained:
  - 25'                      Horizontally from centerline of nearest track



- 23'-3 1/2" Vertically above top of rail
- **1.03.05** Any infringement within State statutory clearances due to the Contractor's operations must be submitted to the Railway and to the City of Colton and must not be undertaken until approved in writing by the Railway, and until the City of Colton has obtained any necessary authorization from the State Regulatory Authority for the infringement. No extra compensation will be allowed in the event the Contractor's work is delayed pending Railway approval, and/or the State Regulatory Authority's approval.
- **1.03.06** In the case of impaired vertical clearance above top of rail, Railway will have the option of installing tell-tales or other protective devices Railway deems necessary for protection of Railway operations. The cost of tell-tales or protective devices will be borne by the Agency.
- **1.03.07** The details of construction affecting the Railway's Property and tracks not included in the contract plans must be submitted to the Railway by City of Colton for approval before work is undertaken and this work must not be undertaken until approved by the Railway.
- **1.03.08** At other than public road crossings, the Contractor must not move any equipment or materials across Railway's tracks until permission has been obtained from the Railway. The Contractor must obtain a "Temporary Construction Crossing Agreement" from the Railway prior to moving his equipment or materials across the Railway's tracks at any point other than a public road crossing. The temporary crossing must be gated and locked at all times when not required for use by the Contractor. The temporary crossing for use of the Contractor will be constructed and, at the completion of the project, removed at the expense of the Contractor.
- **1.03.09** Discharge, release or spill on the Railway Property of any hazardous substances, oil, petroleum, constituents, pollutants, contaminants, or any hazardous waste is prohibited and Contractor must immediately notify the Railway's Resource Operations Center at 1(800) 832-5452, of any discharge, release or spills in excess of a reportable quantity. Contractor must not allow Railway Property to become a treatment, storage or transfer facility as those terms are defined in the Resource Conservation and Recovery Act or any state analogue.
- **1.03.10** The Contractor upon completion of the work covered by this contract, must promptly remove from the Railway's Property all of Contractor's tools, equipment, implements and other materials, whether brought upon said property by said Contractor or any Subcontractor, employee or agent of Contractor or of any Subcontractor, and must cause Railway's Property to be left in a condition acceptable to the Railway's representative.

#### **1.04 Contractor Roadway Worker on Track Safety Program and Safety Action Plan**

- **1.04.01** Each Contractor that will perform work within 25 feet of the centerline of a track must develop and implement a Roadway Worker Protection/On Track Safety Program and work with Railway Project Representative to develop an on track safety strategy as described in the guidelines listed in the on track safety portion of the Safety Orientation. This Program must provide Roadway Worker protection/on track training for all employees of the Contractor, its subcontractors, agents or invitees. This training is reinforced at the job site through job safety briefings. Additionally, each Contractor must develop and implement the Safety Action Plan, as provided for on the web site [www.contractororientation.com](http://www.contractororientation.com), which will be made available to Railway prior to commencement of any work on Railway Property. During the performance of work, the Contractor must audit its work activities. The Contractor must designate an on-site Project Supervisor who will serve as the contact person for the Railway and who will maintain a copy of the Safety Action Plan, safety audits, and Material Safety Datasheets (MSDS), at the job site.
- Contractor shall have a background investigation performed on all of its employees, subcontractors and agents who will be performing any services on railroad property under this Agreement.  
The background screening shall at a minimum meet the criteria defined by the e-RAILSAFE program outlined at <http://www.e-railsafe.com> in addition to any other applicable regulatory requirements. The e-RAILSAFE

program uses rail industry background screening standards.

Contractor shall obtain consent from all employees screened in compliance with the e-RAILSAFE program criteria to release completed background information to BNSF. Contractor shall be subject to periodic audit to ensure compliance.

Contractor shall not permit any of its employees, subcontractors or agents to perform services on property hereunder who are not approved under e-RAILSAFE program standards. Railroad shall have the right to deny entry onto its premises to any of Contractor's employees, subcontractors or agents who do not display the authorized identification badge issued by a background screening service meeting the standards set forth for the e-RAILSAFE program or who pose a threat, in Railroad's reasonable opinion, to the safety or security of Railroad's operations.

Contractors shall ensure its employees, subcontractors and agents are United States citizens or legally working in this country under a work VISA.

### **1.05 Railway Flagger Services:**

- **1.05.01** The Contractor must give Railway's Roadmaster (telephone 909 386-4061) a minimum of thirty (30) calendar days advance notice when flagging services will be required so that the Roadmaster can make appropriate arrangements (i.e., bulletin the flagger's position). If flagging services are scheduled in advance by the Contractor and it is subsequently determined by the parties hereto that such services are no longer necessary, the Contractor must give the Roadmaster five (5) working days advance notice so that appropriate arrangements can be made to abolish the position pursuant to union requirements.
- **1.05.02** Unless determined otherwise by Railway's Project Representative, Railway flagger will be required and furnished when Contractor's work activities are located over, under and/or within twenty-five (25) feet measured horizontally from centerline of the nearest track and when cranes or similar equipment positioned beyond 25-feet from the track centerline could foul the track in the event of tip over or other catastrophic occurrence, but not limited thereto for the following conditions:
  - **1.05.02a** When, upon inspection by Railway's Representative, other conditions warrant.
  - **1.05.02b** When any excavation is performed below the bottom of tie elevation, if, in the opinion of Railway's representative, track or other Railway facilities may be subject to movement or settlement.
  - **1.05.02c** When work in any way interferes with the safe operation of trains at timetable speeds.
  - **1.05.02d** When any hazard is presented to Railway track, communications, signal, electrical, or other facilities either due to persons, material, equipment or blasting in the vicinity.
  - **1.05.02e** Special permission must be obtained from the Railway before moving heavy or cumbersome objects or equipment which might result in making the track impassable.
- **1.05.03** Flagging services will be performed by qualified Railway flaggers.
  - **1.05.03a** Flagging crew generally consists of one employee. However, additional personnel may be required to protect Railway Property and operations, if deemed necessary by the Railways Representative.
  - **1.05.03b** Each time a flagger is called, the minimum period for billing will be the eight (8) hour basic day.
  - **1.05.03c** The cost of flagger services provided by the Railway will be borne by the (Agency). The estimated cost for one (1) flagger is approximately between \$800.00-\$1,600.00 for an eight (8) hour basic day with time and one-half or double time for overtime, rest days and holidays. The estimated cost for each flagger includes vacation allowance, paid holidays, Railway and unemployment insurance, public liability and property damage insurance, health and welfare benefits, vehicle, transportation, meals, lodging, radio, equipment, supervision

and other costs incidental to performing flagging services. Negotiations for Railway labor or collective bargaining agreements and rate changes authorized by appropriate Federal authorities may increase actual or estimated flagging rates. **THE FLAGGING RATE IN EFFECT AT THE TIME OF PERFORMANCE BY THE CONTRACTOR HEREUNDER WILL BE USED TO CALCULATE THE ACTUAL COSTS OF FLAGGING PURSUANT TO THIS PARAGRAPH.**

- **1.05.03d** The average train traffic on this route is 58 freight trains per 24-hour period at a timetable speed 60 MPH and 24 passenger trains at a timetable speed of 70 MPH.

## **1.06 Contractor General Safety Requirements**

- **1.06.01** Work in the proximity of railway track(s) is potentially hazardous where movement of trains and equipment can occur at any time and in any direction. All work performed by contractors within 25 feet of any track must be in compliance with FRA Roadway Worker Protection Regulations.
- **1.06.02** Before beginning any task on Railway Property, a thorough job safety briefing must be conducted with all personnel involved with the task and repeated when the personnel or task changes. If the task is within 25 feet of any track, the job briefing must include the Railway's flagger, as applicable, and include the procedures the Contractor will use to protect its employees, subcontractors, agents or invitees from moving any equipment adjacent to or across any Railway track(s).
- **1.06.03** Workers must not work within 25 feet of the centerline of any track without an on track safety strategy approved by the Railway's Project Representative. When authority is provided, every contractor employee must know: (1) who the Railway flagger is, and how to contact the flagger, (2) limits of the authority, (3) the method of communication to stop and resume work, and (4) location of the designated places of safety. Persons or equipment entering flag/work limits that were not previously job briefed, must notify the flagger immediately, and be given a job briefing when working within 25 feet of the center line of track.
- **1.06.04** When Contractor employees are required to work on the Railway Property after normal working hours or on weekends, the Railroad's representative in charge of the project must be notified. A minimum of two employees must be present at all times.
- **1.06.05** Any employees, agents or invitees of Contractor or its subcontractors under suspicion of being under the influence of drugs or alcohol, or in the possession of same, will be removed from the Railway's Property and subsequently released to the custody of a representative of Contractor management. Future access to the Railway's Property by that employee will be denied.
- **1.06.06** Any damage to Railway Property, or any hazard noticed on passing trains must be reported immediately to the Railway's representative in charge of the project. Any vehicle or machine which may come in contact with track, signal equipment, or structure (bridge) and could result in a train derailment must be reported immediately to the Railway representative in charge of the project and to the Railway's Resource Operations Center at 1(800) 832-5452. Local emergency numbers are to be obtained from the Railway representative in charge of the project prior to the start of any work and must be posted at the job site.
- **1.06.07** For safety reasons, all persons are prohibited from having pocket knives, firearms or other deadly weapons in their possession while working on Railway's Property.
- **1.06.08** All personnel protective equipment (PPE) used on Railway Property must meet applicable OSHA and ANSI specifications. Current Railway personnel protective equipment requirements are listed on the web site, [www.contractororientation.com](http://www.contractororientation.com), however, a partial list of the requirements include: a) safety glasses with permanently affixed side shields (no yellow lenses); b) hard hats c) safety shoe with: hardened toes, above-the-ankle lace-up and a defined heel; and d) high visibility retro-reflective work wear. The Railroad's representative in charge of the project is to be contacted regarding local specifications for meeting requirements relating to hi-visibility work wear. Hearing protection, fall protection, gloves, and respirators must be worn as

required by State and Federal regulations. (NOTE – Should there be a discrepancy between the information contained on the web site and the information in this paragraph, the web site will govern.)

- **1.06.09 THE CONTRACTOR MUST NOT PILE OR STORE ANY MATERIALS, MACHINERY OR EQUIPMENT CLOSER THAN 25'-0" TO THE CENTER LINE OF THE NEAREST RAILWAY TRACK. MATERIALS, MACHINERY OR EQUIPMENT MUST NOT BE STORED OR LEFT WITHIN 250 FEET OF ANY HIGHWAY/RAIL AT-GRADE CROSSINGS OR TEMPORARY CONSTRUCTION CROSSING, WHERE STORAGE OF THE SAME WILL OBSTRUCT THE VIEW OF A TRAIN APPROACHING THE CROSSING. PRIOR TO BEGINNING WORK, THE CONTRACTOR MUST ESTABLISH A STORAGE AREA WITH CONCURRENCE OF THE RAILROAD'S REPRESENTATIVE.**
- **1.06.10** Machines or vehicles must not be left unattended with the engine running. Parked machines or equipment must be in gear with brakes set and if equipped with blade, pan or bucket, they must be lowered to the ground. All machinery and equipment left unattended on Railway's Property must be left inoperable and secured against movement. (See internet Engineering Contractor Safety Orientation program for more detailed specifications)
- **1.06.11** Workers must not create and leave any conditions at the work site that would interfere with water drainage. Any work performed over water must meet all Federal, State and Local regulations.
- **1.06.12** All power line wires must be considered dangerous and of high voltage unless informed to the contrary by proper authority. For all power lines the minimum clearance between the lines and any part of the equipment or load must be; 200 KV or below - 15 feet; 200 to 350 KV - 20 feet; 350 to 500 KV - 25 feet; 500 to 750 KV - 35 feet; and 750 to 1000 KV - 45 feet. If capacity of the line is not known, a minimum clearance of 45 feet must be maintained. A person must be designated to observe clearance of the equipment and give a timely warning for all operations where it is difficult for an operator to maintain the desired clearance by visual means.

## **1.07 Excavation**

- **1.07.01** Before excavating, the Contractor must determine whether any underground pipe lines, electric wires, or cables, including fiber optic cable systems are present and located within the Project work area. The Contractor must determine whether excavation on Railway's Property could cause damage to buried cables resulting in delay to Railway traffic and disruption of service to users. Delays and disruptions to service may cause business interruptions involving loss of revenue and profits. Before commencing excavation, the Contractor must contact BNSF's Field Engineering Representative (Greg Rousseau, 909-386-4079). All underground and overhead wires will be considered HIGH VOLTAGE and dangerous until verified with the company having ownership of the line. **It is the Contractor's responsibility to notify any other companies that have underground utilities in the area and arrange for the location of all underground utilities before excavating.**
- **1.07.02** The Contractor must cease all work and notify the Railway immediately before continuing excavation in the area if obstructions are encountered which do not appear on drawings. If the obstruction is a utility and the owner of the utility can be identified, then the Contractor must also notify the owner immediately. If there is any doubt about the location of underground cables or lines of any kind, no work must be performed until the exact location has been determined. There will be no exceptions to these instructions.
- **1.07.03** All excavations must be conducted in compliance with applicable OSHA regulations and, regardless of depth, must be shored where there is any danger to tracks, structures or personnel.
- **1.07.04** Any excavations, holes or trenches on the Railway's Property must be covered, guarded and/or protected when not being worked on. When leaving work site areas at night and over weekends, the areas must be secured and left in a condition that will ensure that Railway employees and other personnel who may be working or passing through the area are protected from all hazards. All excavations must be back filled as soon

as possible.

## **1.08 Hazardous Waste, Substances and Material Reporting**

- **1.08.01** If Contractor discovers any hazardous waste, hazardous substance, petroleum or other deleterious material, including but not limited to any non-containerized commodity or material, on or adjacent to Railway's Property, in or near any surface water, swamp, wetlands or waterways, while performing any work under this Agreement, Contractor must immediately: (a) notify the Railway's Resource Operations Center at 1(800) 832-5452, of such discovery; (b) take safeguards necessary to protect its employees, subcontractors, agents and/or third parties; and (c) exercise due care with respect to the release, including the taking of any appropriate measure to minimize the impact of such release.

## **1.09 Personal Injury Reporting**

- **1.09.01** The Railway is required to report certain injuries as a part of compliance with Federal Railroad Administration (FRA) reporting requirements. Any personal injury sustained by an employee of the Contractor, subcontractor or Contractor's invitees while on the Railway's Property must be reported immediately (by phone mail if unable to contact in person) to the Railway's representative in charge of the project. The Non-Employee Personal Injury Data Collection Form contained herein is to be completed and sent by Fax to the Railway at 1(817) 352-7595 and to the Railway's Project Representative no later than the close of shift on the date of the injury.

## NON-EMPLOYEE PERSONAL INJURY DATA COLLECTION

INFORMATION REQUIRED TO BE COLLECTED PURSUANT TO FEDERAL REGULATION. IT SHOULD BE USED FOR COMPLIANCE WITH FEDERAL REGULATIONS ONLY AND IS NOT INTENDED TO PRESUME ACCEPTANCE OF RESPONSIBILITY OR LIABILITY.

1. Accident City/St \_\_\_\_\_ 2. Date: \_\_\_\_\_ Time: \_\_\_\_\_  
County: \_\_\_\_\_ 3. Temperature: \_\_\_\_\_ 4. Weather \_\_\_\_\_  
(if non-Railway location)
5. Social Security # \_\_\_\_\_
6. Name (last, first, mi) \_\_\_\_\_
7. Address: Street: \_\_\_\_\_ City: \_\_\_\_\_ St. \_\_\_\_\_ Zip: \_\_\_\_\_
8. Date of Birth: \_\_\_\_\_ and/or Age \_\_\_\_\_ Gender: \_\_\_\_\_  
(if available)
9. (a) Injury: \_\_\_\_\_ (b) Body Part: \_\_\_\_\_  
(i.e. (a) Laceration (b) Hand)
11. Description of Accident (To include location, action, result, etc.): \_\_\_\_\_
12. Treatment:  
    ? First Aid Only  
    ? Required Medical Treatment  
    ? Other Medical Treatment
13. Dr. Name \_\_\_\_\_ 30. Date: \_\_\_\_\_
14. Dr. Address:  
    Street: \_\_\_\_\_ City: \_\_\_\_\_ St: \_\_\_\_\_ Zip: \_\_\_\_\_
15. Hospital Name: \_\_\_\_\_
16. Hospital Address:  
    Street: \_\_\_\_\_ City: \_\_\_\_\_ St: \_\_\_\_\_ Zip: \_\_\_\_\_
17. Diagnosis: \_\_\_\_\_

**FAX TO  
RAILWAY AT (817) 352-7595  
AND COPY TO  
RAILWAY ROADMASTER FAX**

## EXHIBIT "C-1"

Agreement  
Between  
BNSF RAILWAY COMPANY  
and the  
CONTRACTOR

**BNSF RAILWAY COMPANY**  
Attention: Manager Public Projects

**Railway File: Colton QZ Project**

**Agency Project:** \_\_\_\_\_

Gentlemen:

The undersigned (hereinafter called, the "Contractor"), has entered into a contract (the "Contract") dated \_\_\_\_\_, 2011, [\*\*\*Drafter's Note: insert the date of the contract between the Agency and the Contractor here] with the City of Colton for the performance of certain work in connection with the following project: Colton QZ Project. Performance of such work will necessarily require contractor to enter BNSF RAILWAY COMPANY ("Railway") right of way and property ("Railway Property"). The Contract provides that no work will be commenced within Railway Property until the Contractor employed in connection with said work for City of Colton (i) executes and delivers to Railway an Agreement in the form hereof, and (ii) provides insurance of the coverage and limits specified in such Agreement and Section 3 herein. If this Agreement is executed by a party who is not the Owner, General Partner, President or Vice President of Contractor, Contractor must furnish evidence to Railway certifying that the signatory is empowered to execute this Agreement on behalf of Contractor.

Accordingly, in consideration of Railway granting permission to Contractor to enter upon Railway Property and as an inducement for such entry, Contractor, effective on the date of the Contract, has agreed and does hereby agree with Railway as follows:

### Section 1. RELEASE OF LIABILITY AND INDEMNITY

Contractor hereby waives, releases, indemnifies, defends and holds harmless Railway for all judgments, awards, claims, demands, and expenses (including attorneys' fees), for injury or death to all persons, including Railway's and Contractor's officers and employees, and for loss and damage to property belonging to any person, arising in any manner from Contractor's or any of Contractor's subcontractors' acts or omissions or any work performed on or about Railway's property or right-of-way. **THE LIABILITY ASSUMED BY CONTRACTOR WILL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DESTRUCTION, DAMAGE, DEATH, OR INJURY WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF RAILWAY, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY CAUSED BY THE WILLFUL MISCONDUCT OR SOLE NEGLIGENCE OF RAILWAY.**

**THE INDEMNIFICATION OBLIGATION ASSUMED BY CONTRACTOR INCLUDES ANY CLAIMS, SUITS OR JUDGMENTS BROUGHT AGAINST RAILWAY UNDER THE FEDERAL EMPLOYEE'S LIABILITY ACT, INCLUDING CLAIMS FOR STRICT LIABILITY UNDER THE SAFETY APPLIANCE ACT OR THE LOCOMOTIVE INSPECTION ACT, WHENEVER SO CLAIMED.**

Contractor further agrees, at its expense, in the name and on behalf of Railway, that it will adjust and settle all claims made against Railway, and will, at Railway's discretion, appear and defend any suits or actions of law or in equity brought against Railway on any claim or cause of action arising or growing out of or in any manner

connected with any liability assumed by Contractor under this Agreement for which Railway is liable or is alleged to be liable. Railway will give notice to Contractor, in writing, of the receipt or dependency of such claims and thereupon Contractor must proceed to adjust and handle to a conclusion such claims, and in the event of a suit being brought against Railway, Railway may forward summons and complaint or other process in connection therewith to Contractor, and Contractor, at Railway's discretion, must defend, adjust, or settle such suits and protect, indemnify, and save harmless Railway from and against all damages, judgments, decrees, attorney's fees, costs, and expenses growing out of or resulting from or incident to any such claims or suits.

In addition to any other provision of this Agreement, in the event that all or any portion of this Article shall be deemed to be inapplicable for any reason, including without limitation as a result of a decision of an applicable court, legislative enactment or regulatory order, the parties agree that this Article shall be interpreted as requiring Contractor to indemnify Railroad to the fullest extent permitted by applicable law. **THROUGH THIS AGREEMENT THE PARTIES EXPRESSLY INTEND FOR CONTRACTOR TO INDEMNIFY RAILROAD FOR RAILROAD'S ACTS OF NEGLIGENCE.**

It is mutually understood and agreed that the assumption of liabilities and indemnification provided for in this Agreement survive any termination of this Agreement.

## **Section 2. TERM**

This Agreement is effective from the date of the Contract until (i) the completion of the project set forth herein, and (ii) full and complete payment to Railway of any and all sums or other amounts owing and due hereunder.

## **Section 3. INSURANCE**

Contractor must, at its sole cost and expense, procure and maintain during the life of this Agreement the following insurance coverage:

A. Commercial General Liability insurance. This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$2,000,000 each occurrence and an aggregate limit of at least \$4,000,000 but in no event less than the amount otherwise carried by the contractor. Coverage must be purchased on a post 1998 ISO occurrence form or equivalent and include coverage for, but not limit to the following:

- ◆ Bodily Injury and Property Damage
- ◆ Personal Injury and Advertising Injury
- ◆ Fire legal liability
- ◆ Products and completed operations

This policy must also contain the following endorsements, which must be indicated on the certificate of insurance:

- ◆ The definition of insured contract must be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.
- ◆ Waiver of subrogation in favor of and acceptable to Railroad.
- ◆ Additional insured endorsement in favor of and acceptable to Railroad.
- ◆ Separation of insureds.
- ◆ The policy shall be primary and non-contributing with respect to any insurance carried by Railroad.

It is agreed that any workers' compensation exclusion does not apply to *Railroad* payments related to the Federal Employers Liability Act or a *Railroad* Wage Continuation Program or similar programs and any payments made are deemed not to be either payments made or obligations assumed under any Workers Compensation, disability benefits, or unemployment compensation law or similar law.



No other endorsements limiting coverage as respects obligations under this Agreement may be included on the policy with regard to the work being performed under this agreement.

- B. Business Automobile Insurance. This insurance must contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to the following:

- ◆ Bodily injury and property damage
- ◆ Any and all vehicles owned, used or hired

The policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

- ◆ Waiver of subrogation in favor of and acceptable to Railroad.
- ◆ Additional insured endorsement in favor of and acceptable to Railroad.
- ◆ Separation of insureds.
- ◆ The policy shall be primary and non-contributing with respect to any insurance carried by Railroad.

- C. Workers Compensation and Employers Liability insurance including coverage for, but not limited to:

- ◆ Contractor's statutory liability under the worker's compensation laws of the state(s) in which the work is to be performed. If optional under State law, the insurance must cover all employees anyway.
- ◆ Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.

This policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

- ◆ Waiver of subrogation in favor of and acceptable to Railroad.

- D. Railroad Protective Liability insurance naming only the **Railroad** as the Insured with coverage of at least \$2,000,000 per occurrence and \$6,000,000 in the aggregate. The policy Must be issued on a standard ISO form CG 00 35 10 93 and include the following:

- ◆ Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93)
- ◆ Endorsed to include the Limited Seepage and Pollution Endorsement.
- ◆ Endorsed to remove any exclusion for punitive damages.
- ◆ No other endorsements restricting coverage may be added.
- ◆ The original policy must be provided to the **Railroad** prior to performing any work or services under this Agreement

In lieu of providing a Railroad Protective Liability Policy, Licensee may participate in Licensor's Blanket Railroad Protective Liability Insurance Policy available to contractor.

**Other Requirements:**

All policies (applying to coverage listed above) must not contain an exclusion for punitive damages and certificates of insurance must reflect that no exclusion exists.

Contractor agrees to waive its right of recovery against **Railroad** for all claims and suits against **Railroad**. In addition, its insurers, through the terms of the policy or policy endorsement, waive their right of subrogation against **Railroad** for all claims and suits. The certificate of insurance must reflect the waiver of subrogation

endorsement. Contractor further waives its right of recovery, and its insurers also waive their right of subrogation against **Railroad** for loss of its owned or leased property or property under contractor's care, custody or control.

Contractor is not allowed to self-insure without the prior written consent of **Railroad**. If granted by **Railroad**, any deductible, self-insured retention or other financial responsibility for claims must be covered directly by contractor in lieu of insurance. Any and all **Railroad** liabilities that would otherwise, in accordance with the provisions of this **Agreement**, be covered by contractor's insurance will be covered as if contractor elected not to include a deductible, self-insured retention or other financial responsibility for claims.

Prior to commencing the Work, contractor must furnish to **Railroad** an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. The policy(ies) must contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify **Railroad** in writing at least 30 days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision must be indicated on the certificate of insurance. Upon request from **Railroad**, a certified duplicate original of any required policy must be furnished. Contractor should send the certificate(s) to the following address:

Ebix BPO  
PO Box 12010-BN  
Hemet, CA 92546-8010  
Fax number: 951-652-2882  
Email: bnsf@ebix.com

Any insurance policy must be written by a reputable insurance company acceptable to **Railroad** or with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provide.

Contractor represents that this **Agreement** has been thoroughly reviewed by contractor's insurance agent(s)/broker(s), who have been instructed by contractor to procure the insurance coverage required by this **Agreement**. Allocated Loss Expense must be in addition to all policy limits for coverages referenced above. Not more frequently than once every five years, **Railroad** may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.

If any portion of the operation is to be subcontracted by contractor, contractor must require that the subcontractor provide and maintain the insurance coverages set forth herein, naming **Railroad** as an additional insured, and requiring that the subcontractor release, defend and indemnify **Railroad** to the same extent and under the same terms and conditions as contractor is required to release, defend and indemnify **Railroad** herein.

Failure to provide evidence as required by this section will entitle, but not require, **Railroad** to terminate this **Agreement** immediately. Acceptance of a certificate that does not comply with this section will not operate as a waiver of contractor's obligations hereunder.

The fact that insurance (including, without limitation, self-insurance) is obtained by contractor will not be deemed to release or diminish the liability of contractor including, without limitation, liability under the indemnity provisions of this **Agreement**. Damages recoverable by **Railroad** will not be limited by the amount of the required insurance coverage.

For purposes of this section, **Railroad** means "Burlington Northern Santa Fe Corporation", "BNSF RAILWAY COMPANY" and the subsidiaries, successors, assigns and affiliates of each.

#### **Section 4. EXHIBIT "C" CONTRACTOR REQUIREMENTS**

The Contractor must observe and comply with all provisions, obligations, requirements and limitations contained in the Contract, and the Contractor Requirements set forth on Exhibit "C" attached to the Contract and this

Agreement, , including, but not be limited to, payment of all costs incurred for any damages to Railway roadbed, tracks, and/or appurtenances thereto, resulting from use, occupancy, or presence of its employees, representatives, or agents or subcontractors on or about the construction site.

#### **Section 5. TRAIN DELAY**

Contractor is responsible for and hereby indemnifies and holds harmless Railway (including its affiliated railway companies, and its tenants) for, from and against all damages arising from any unscheduled delay to a freight or passenger train which affects Railway's ability to fully utilize its equipment and to meet customer service and contract obligations. Contractor will be billed, as further provided below, for the economic losses arising from loss of use of equipment, contractual loss of incentive pay and bonuses and contractual penalties resulting from train delays, whether caused by Contractor, or subcontractors, or by the Railway performing work under this Agreement. Railway agrees that it will not perform any act to unnecessarily cause train delay.

For loss of use of equipment, Contractor will be billed the current freight train hour rate per train as determined from Railway's records. Any disruption to train traffic may cause delays to multiple trains at the same time for the same period.

Additionally, the parties acknowledge that passenger, U.S. mail trains and certain other grain, intermodal, coal and freight trains operate under incentive/penalty contracts between Railway and its customer(s). Under these arrangements, if Railway does not meet its contract service commitments, Railway may suffer loss of performance or incentive pay and/or be subject to penalty payments. Contractor is responsible for any train performance and incentive penalties or other contractual economic losses actually incurred by Railway which are attributable to a train delay caused by Contractor or its subcontractors.

The contractual relationship between Railway and its customers is proprietary and confidential. In the event of a train delay covered by this Agreement, Railway will share information relevant to any train delay to the extent consistent with Railway confidentiality obligations. Damages for train delay are currently \$382.20 per hour per incident. **THE RATE THEN IN EFFECT AT THE TIME OF PERFORMANCE BY THE CONTRACTOR HEREUNDER WILL BE USED TO CALCULATE THE ACTUAL COSTS OF TRAIN DELAY PURSUANT TO THIS AGREEMENT.**

Contractor and its subcontractors must give Railway's representative (Greg Rousseau – 909-386-4079) four (4) weeks advance notice of the times and dates for proposed work windows. Railway and Contractor will establish mutually agreeable work windows for the project. Railway has the right at any time to revise or change the work windows due to train operations or service obligations. Railway will not be responsible for any additional costs or expenses resulting from a change in work windows. Additional costs or expenses resulting from a change in work windows shall be accounted for in Contractor's expenses for the project.

Contractor and subcontractors must plan, schedule, coordinate and conduct all Contractor's work so as to not cause any delays to any trains.

Kindly acknowledge receipt of this letter by signing and returning to the Railway two original copies of this letter, which, upon execution by Railway, will constitute an Agreement between us.

\_\_\_\_\_  
**Contractor**

**BNSF Railway Company**

By: \_\_\_\_\_

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Name: \_\_\_\_\_

Manager Public Projects

Title: \_\_\_\_\_

Accepted and effective this \_\_\_\_\_ day of 20\_\_.

Contact Person: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_

State: \_\_\_\_\_ Zip: \_\_\_\_\_

Fax: \_\_\_\_\_

Phone: \_\_\_\_\_

E-mail: \_\_\_\_\_